



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

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MEMORANDUM

SUBJECT: Review of the California Regulation for Land Use Covenants and Its Use in Support of CERCLA Response Actions

FROM: 
James E. Woolford, Director
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TO: Keith Takata, Director
Superfund Division, Region IX

Purpose:

The purpose of this memorandum is to discuss the factors that are considered when determining whether a State regulation is an applicable or relevant and appropriate requirement (ARAR) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as well as to express support for the California Regulation for Land Use Covenants (California Code of Regulations, Title 22, Division 4.5, Chapter 39, Section 67391.1), given the importance of these regulations for maintaining the overall protectiveness of CERCLA remedies where land use controls are needed. Regulations that establish requirements for land use controls may constitute ARARs depending on the specific language of the regulation and on site-specific circumstances. While we are not yet ready to make a final determination on whether the California regulation constitutes an ARAR under CERCLA, the following analysis may be helpful to the State should it decide to amend its regulation in the future.

Analysis:

A number of key factors for evaluating ARAR determinations have been described in various places, such as CERCLA (e.g., Section 121 (d)(2)(i)), the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 C.F.R. 300.5), the "Compliance with Other Laws Manual" (EPA540/G-89/006, August 1988; see pages 1-10 through 1-12), and other guidance. Factors the Agency considers when determining the ARAR status of regulations and statutes generally include the following:

- Is the standard more stringent than the relevant federal standard (e.g., more stringent than a specific regulation)?
- Is the standard promulgated and enforceable?

- Is the standard health based?
- Is the standard generally applicable on its face and consistently applied?
- Does the standard provide substantive requirements that define protectiveness?
- Is the standard clear on its face and not unduly vague?

An entire regulation or standard may be an ARAR, or in appropriate circumstances, a portion or portions of the regulation or standard may constitute an ARAR. Where only a portion is being evaluated, the Agency considers that portion in context of the entire state statute or regulation/standard in its totality. In general, ARAR evaluations are based on a clear reading of the standard in light of site-specific circumstances.

A particular provision is likely to be deemed an ARAR when it establishes a clear standard for achieving protectiveness on its face. For example, regulations that provide specifics of how a land use will actually be restricted or provide the actual circumstances where a covenant consistently must be used typically would be considered to be an ARAR - provided it meets the other factors described above. We would expect such regulation would likely include requirements that enable regulators to apply, modify, terminate or determine the feasibility of a land use covenant *at any given site* on a consistent basis.

By way of illustration, it appears that some portions of Colorado's environmental covenants law (see Colorado Revised Statutes, Article 15 of Title 25 Part 3 (25-15-301 et seq. CRS)) may constitute an ARAR in appropriate site-specific circumstances. In particular, the Colorado environmental covenants law states:

Section 25-15-320

- (2) An environmental covenant under this Part 3 shall be required for any environmental remediation project in which the relevant regulatory authority makes a remedial decision on or after July 1, 2001, that would result in either or both of the following:
- (a) Residual contamination at levels that have been determined to be safe for one or more specific uses, but not all uses; or
 - (b) Incorporation of an engineered feature or structure that requires monitoring, maintenance, or operation or that will not function as intended if it is disturbed.

The Colorado law thus could be deemed to have established a clear substantive standard: an environmental covenant is required unless contaminants are reduced to a level that allows for unrestricted residential use and there is no remaining monitoring or operation and maintenance requirements.

Summary:

California should be applauded for its work in promulgating a regulation that will help ensure the long-term reliability of land use controls. However, the state may wish to modify their regulations to ensure that it is considered an ARAR in all site-specific situations. In addition, whether or not the California regulation is an ARAR, if compliance with the regulation is necessary to ensure the reliability and protectiveness of the remedy, then the Record of Decision may require such compliance.

cc: Gail A. Cooper (FFRRO)
Mary Kay Lynch (OGC)